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Recommended Citation

Amending the Oversight: Legislative Drafting and the Cable Act, 8 Cardozo Arts & Ent. L.J. 233 (1990)

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AMENDING THE OVERSIGHT: LEGISLATIVE DRAFTING AND THE CABLE ACT

MICHAEL I. MEYERSON*

The Cable Communications Policy Act of 1984 ("Cable Act")¹ heralded a new age for the law and regulation of cable television. The Cable Act represented the first comprehensive federal law governing the no-longer new communications technology of cable television. After years of confronting a "patch-work" of federal, state, and local regulation, the cable industry, government regulators, and the public were told that the Cable Act would create a "national policy concerning cable communications,"² and firmly "establish guidelines for the exercise of Federal, State, and local authority."³

Unfortunately, the Cable Act has failed to fulfill its numerous objectives. Advertised as a careful balance, the Cable Act has been administratively and judicially converted to a lopsided grant of victory to the cable industry. Proclaimed a harbinger of clarity, the Cable Act has led to frequent litigation over the meaning of its most basic terms.

This result is due to a perhaps not unusual combination of legislative factors. First, despite the elongated negotiation process, the final version of the bill was hurried through the end of a long congressional term. Second, Congress entrusted the Federal Communications Commission ("FCC" or "the Commission") to carry out its mandate of compromise, only to have both the FCC and the reviewing courts ignore the language and spirit of the Cable Act.⁴ Finally, in constructing the delicate balance of the Cable Act, the legislative drafters listened to too few voices. The primary negotiators were representatives of the cable industry and the cities; no other input was permitted until the bill was in almost final form, and numerous gaps in the law were permit-

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¹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)). Since the legislative history and proposed amendments use the numbering of sections from the original law as passed, this Article will also use that numbering in the text. Footnotes will provide both section numbers.

² Cable Act, § 601(1), 47 U.S.C. § 521(1).

³ *Id.* at § 601(3), 47 U.S.C. at § 521(3).

⁴ See *infra* text accompanying notes 70-93.

ted to remain.⁵

There have been extensive congressional discussions over the flaws of the Cable Act.⁶ Due to this "legislative oversight," substantial amendment is likely. While basic policy issues, such as the continuance of rate deregulation and the problems of vertical integration, have occupied most of the discussions of the Cable Act, many areas of cable policy have received only scant attention. This Article examines some of the important, yet generally overlooked, problems created by the Cable Act. The Article also proposes amendments to permit the Cable Act to fulfill its original lofty promise.

I. AMBIGUITY AND OTHER DISEASES OF LANGUAGE⁷

All legislation starts with the serious drawback of being composed of words. The inability of language to create certainty of understanding is a long-acknowledged reality: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."⁸ And as Justice Felix Frankfurter explained, this difficulty in interpretation is many times greater for complex statutes, "If individual words are inexact symbols with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. . . . A statute is an instrument of government partaking of its practical purposes but also its infirmities and limitations, of its awkward and groping efforts."⁹

The Cable Act, however, has more than its fair share of "awkward and groping efforts." Needless confusion has been created by the failure to define fundamental terms. Avoidable litigation has been caused by other definitions that speak with more ambiguity than clarity. Still other critical areas of the Cable Act are permeated by unelucidating sounds of silence.

One of the cardinal rules of legislative drafting is to never use the same word to convey more than one concept. Repeating

⁵ See *infra* text accompanying notes 94-96.

⁶ See *Oversight of Cable TV Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, S. Hrg. 101-464 101st Cong., 1st Sess. (1989) [hereinafter *Oversight of Cable TV*]; *Competitive Issues in the Cable Television Industry Hearings Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, S. Hrg. 100-818, 100th Cong. 2d Sess. (1989).

⁷ See generally R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 43-53 (1975) [hereinafter *THE INTERPRETATION AND APPLICATION OF STATUTES*].

⁸ *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

⁹ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

a word to express different meanings, so-called "utraquistic subterfuge,"¹⁰ will inevitably lead to confusion by violating the logical presumption that, within a single statute or document, the same word will refer to the same idea.

The Cable Act manages to use the word "service" (or "services") to convey at least four mutually exclusive thoughts. For example, the Cable Act requires certain cable operators to provide channels for the commercial use of unaffiliated parties,¹¹ and has provisions to prevent cable operators from circumventing this requirement. Section 612(c)(3) states that these channels, "shall not be used to provide a cable service . . . if the provision of such programming is intended to avoid the purpose of this section." The "services" in this subsection unmistakably mean "programming."¹²

The Cable Act defines "cable service," though, more broadly, as "the one-way transmission of . . . video programming, or . . . other programming service, and . . . subscriber interaction, if any, . . . required for the selection of such video programming or other programming service."¹³ This definition of "cable service" was meant to draw the boundary between that which could not be governed by common carrier regulation and "non-cable services" whose regulation the Cable Act was not designed to preempt.¹⁴ Accordingly, "cable services" includes not only video programming, but pay-per-view, the one-way transmission of computer games, and one-way videotext.¹⁵ Non-cable services include shopping and banking at home, electronic mail, and video-conferencing.¹⁶

The distinction between "services" meaning only video programming and "cable service" meaning video programming and the provision of one-way information technology was ignored by the FCC in its proceedings on rate deregulation. The Cable Act specified that such deregulation was to occur except where the FCC found that a "cable system [was] not subject to effective

¹⁰ R. DICKERSON, LEGISLATIVE DRAFTING 62 (1954) [hereinafter LEGISLATIVE DRAFTING].

¹¹ For a discussion of the failure of section 612 to create a workable system for leased access, see *infra* text accompanying notes 112-19.

¹² See, e.g., H.R. REP. NO. 934, 98th Cong., 2d Sess. 47, reprinted in 1984 U.S. CODE, CONG. & ADMIN. NEWS 4655, 4684 [hereinafter HOUSE REPORT 934] (referring to "increase in the sources of programming").

¹³ Cable Act, §§ 602(5)(A), (5)(B), 47 U.S.C. §§ 522(5)(A), (5)(B).

¹⁴ HOUSE REPORT 934, *supra* note 12, at 41-42.

¹⁵ *Id.* at 44.

¹⁶ *Id.*

competition."¹⁷ In its rulemaking, the FCC quoted the directive from the House Report: "In determining whether [a] cable system is subject to effective competition . . . the FCC should consider the *number and nature of services provided*, compared with the number and nature of services available from alternative sources and, if so, at what price."¹⁸ In defining "effective competition," the Commission only considered competition for video programming, but not other forms of "information services." Perhaps that analysis is that which Congress intended. Perhaps all legislative thought on rate-making concerned rates charged for video programming. If so, more precise language should have been used in the legislation.

A still different definition of "services" must be discerned for section 625(e), which explicitly bars the operator from obtaining court-ordered modification of "any requirement for *services* relating to public, educational, or governmental access."¹⁹ "Services" cannot possibly mean "programming" for this provision because the cable operator does not supply programming for public, educational or governmental access. In fact, the cable operator is statutorily prohibited from exercising any editorial control over the programming that is shown on the access channels.²⁰ Thus, there cannot be any requirement imposed on the cable operator for *programming* "relating to public, educational, or governmental access."

Although the phrase "access services" is not defined in the Cable Act, it may be possible to define "access services" by ascertaining what those services do *not* include. The section on modification does refer to access requirements other than "access services." The cable operator is permitted to obtain modification of "facilities or equipment, including public, educational, or governmental access facilities or equipment,"²¹ upon proof of commercial impracticability. This provision, unfortunately, merely further confuses the reader. A perusal of the Cable Act reveals

¹⁷ Cable Act, § 623(b)(1), 47 U.S.C. § 543(b)(1). For a discussion of the FCC's decision making process regarding this standard, see *infra* notes 87-93 and accompanying text.

¹⁸ *Implementing the Provisions of the Cable Communications Policy Act of 1984*, 49 Fed. Reg. 48,765, 48,770 (1985) (quoting HOUSE REPORT 934, *supra* note 12, at 66).

¹⁹ Cable Act, § 625(e) (emphasis added), 47 U.S.C. § 545(e) (emphasis added).

²⁰ Cable Act, § 611(e), 47 U.S.C. § 531(e).

²¹ Cable Act, § 625(a)(1)(A), 47 U.S.C. § 545(a)(1)(A). "Facilities or equipment" seems to refer primarily to hardware and physical structure. "Commercial impracticability" is given the same meaning as in the Uniform Commercial Code. See HOUSE REPORT 934, *supra* note 12, at 71 (referring to U.C.C. § 2-615 comment 8 (1978)).

not only that "services" does not always mean "services," but that "facilities" are only a subset of "facilities."

In a fascinating, though far from unique, example of self-reference, the definitional section of the Cable Act actually defines "public, educational, or governmental access facilities" to mean both "*channel capacity designated for [access]*" and *facilities and equipment* for the use of such channel capacity."²² Thus, when speaking of access, "facilities and equipment" means "facilities" minus "channel capacity."²³ Though it may seem gratuitous, it should probably be pointed out that the phrase that is defined in the "Definitions" section, "public, educational, or governmental access facilities," does not appear by itself anywhere in the Cable Act except in the definitional section — only the subterm "access facilities or equipment" appears.

Because (1) "access facilities and equipment" does not include "channel capacity," and (2) the only reference to access other than to "facilities and equipment" in the modification section is to access "services," it may be assumed that (3) "services" in this subsection encompasses the channel capacity set aside for access. To the rather obvious question of why the term "channel capacity" was not used, it could be argued that "services" was meant to also include all other non-hardware requirements such as staffing, promotion, and funding of access centers.²⁴

A final meaning for "service" can be found in section 626(c)(1)(B), permitting denial of franchise renewal for "the quality of the operator's service." "Service" here seems to encompass notions of "consumer protection."²⁵ The Cable Act states that "operator's service" means "signal quality, response to consumer complaints, and billing practices" but not "cable

²² Cable Act, § 602(13), 47 U.S.C. § 522(13) (emphasis added). There also appears to be no significance between the conjunctive "facilities and equipment" used in the definitional section and disjunctive "facilities or equipment" used in the modification section. The House Report, in describing the modification section, utilizes the conjunctive phrase as well: "[T]he cable operator may obtain modification of a requirement for facilities and equipment" HOUSE REPORT 934, *supra* note 12, at 71 (emphasis added).

²³ Apparently, this statutory distinction was not appreciated by those who wrote the House Report, since, in a discussion of the facilities and equipment that could be required in a franchise, it is stated that "[f]acility and equipment requirements may include requirements which relate to channel capacity. . . ." HOUSE REPORT 934, *supra* note 12, at 68.

²⁴ See Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 578 (1985).

²⁵ See Cable Act § 632, 47 U.S.C. § 552, which is titled "Consumer protection" and refers to enforcement of "customer service requirements." *Id.* at § 623(1)(a), 47 U.S.C. § 543(1)(a).

services."²⁶

There is absolutely no excuse for requiring those trying to understand a statute to work so hard to ascertain different meanings for the same word. Such confusion should be avoided through amending the language of the Cable Act. The word "services" should be used to mean programming or information provided to subscribers over the cable system. To describe videotext, on-line airline guides and the like, the term "information services," used in section 624(b)(1),²⁷ should replace the phrase "programming service" that was used in the definitional section 602(5). When programming — video, audio or both — is meant, that word should be used. For the prohibition on modification of access "services," the phrase "channel capacity, funding and other requirements for access other than facilities and equipment" should be substituted. For the renewal section, "customer service" could be used instead of "operator's service."

The ambiguity of the word "service" leads to another area of confusion. The Cable Act preempts local regulation of "rates for the provision of cable service."²⁸ The Cable Act does not define, however, the words "rates" and "provision." If "cable service" is video and other programming, plus the interaction "required" for the selection of the programming,²⁹ what about other aspects of cable technology? One court ruled that, despite rate deregulation, a state may prohibit a cable operator from charging subscribers who live in sparsely populated rural areas an additional fee for "contributions in aid of construction."³⁰ This ruling was based on the concern that charging different subscribers different fees would conflict with Congress's "emphasis on encouraging equal access to cable television."³¹

Courts have been divided over the ability of localities to regulate cable charges other than for programming. One court has held that disconnect fees can be regulated.³² Another court held that fees for FM service, second cable outlets, and remote control

²⁶ *Id.* at § 626(c)(1)(B), 47 U.S.C. § 546 (c)(1)(B). The Cable Act uses the term "cable services" to mean programming. *See supra* text accompanying notes 12-13.

²⁷ Cable Act, § 624, 47 U.S.C. § 545 (prohibiting franchise requirements for specific "video programming or other information services").

²⁸ *Id.* at § 623(a),(b), 47 U.S.C. § 543(a),(b) (permitting deregulation if a cable system faces "effective competition").

²⁹ *Id.* at § 602(5), § 522(5). *See supra* text accompanying notes 14-16.

³⁰ *Housatonic Cable Vision Co. v. Department of Pub. Util. Control*, 622 F. Supp. 798 (D. Conn. 1985).

³¹ *Id.* at 811.

³² *Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights*, 178 Mich. App. 117, 443 N.W. 2d 440 (1989).

devices are "rates" and thus protected from local regulation.³³

Other questions arise. For example, in the Cable Act, there is no discussion of whether a city can regulate the rates for the provision of "lock boxes," devices that permit individual subscribers to block out offensive programming.³⁴ Lock boxes play a critical role in the regulation of cable television. They permit individual households to keep indecent programming off their sets, without censorship and without preventing the viewing by those who wish to see such programming.³⁵ It would be a legitimate policy decision for a locality to decide that the costs of protecting the sensitive, without harming the willing, viewer should be shared by the entire community, not just those desiring the protection. This would be the economic effect of providing lock boxes at no charge to all who request them.³⁶ Cities should be permitted either to require the free distribution of lock boxes or to regulate the price at which they are made available.

A revision of the Cable Act should specify that such regulation is permitted. For localities where rates have been deregulated, a logical distinction should be drawn into the legislation, one based on the premise that only "effective competition" precludes the need for regulation. Under traditional economic analysis, consumers in a competitive market will choose to purchase cable service if they value the additional programming they can receive at more than the monthly price they must pay.³⁷ Cable companies, according to this theory, will not charge exorbitant prices when there are easy alternatives, and video and radio services should be deregulated in competitive markets. There is no reason to believe, though, that secondary charges will be similarly controlled by market forces. Disconnect fees, for example, will not figure in a consumer's initial purchasing decision.³⁸ Furthermore, as stated earlier, there may be policy reasons to price lock boxes at below market prices. The revised Cable Act, if it continues rate deregulation, should describe explicitly what

³³ *City of Dubuque v. Group W Cable*, C 85-1046 (N.D. Iowa Feb. 25, 1987), reported in KAGAN, CABLE TV L. RPTR., Mar. 11, 1987, at 5. See *Rosenthal v. Sammons Communications*, W85-0214(B) (S.D. Miss. May 8, 1986), reported in KAGAN, CABLE TV L. RPTR., June 13, 1987, at 8 (preemption of charges for wiring second television sets).

³⁴ See Cable Act, § 624(d)(2), 47 U.S.C. § 544(d)(2).

³⁵ HOUSE REPORT 934, *supra* note 12, at 70.

³⁶ The Cable Act only requires that the operator provide lock boxes to those who request them. There is no requirement that they be affordable. Cable Act, § 624(d)(2), 47 U.S.C. § 544(d)(2).

³⁷ See generally R. POSNER, ECONOMIC ANALYSIS OF LAW 3-10 (2d ed. 1977).

³⁸ This analysis is similar to why many courts do not enforce secondary clauses in consumer form contracts. See generally E. FARNSWORTH, CONTRACTS 293-302 (1982).

"rates" are deregulated and specify that the preemption of regulating "rates for the provision of cable service"³⁹ only includes video and other programming, plus the technology necessary for the general reception of that programming. Thus, the converters used by all subscribers would be free from regulation, but other charges not affected by "effective competition," such as lock boxes, disconnect fees, or late fees, would be subject to city review.

Other local regulation involving rates may further the effectiveness of the "competitive" market. A requirement that reasonable notice be given prior to a rate increase taking effect would permit subscribers to make alternate arrangements for the reception of video programming without paying the unbar-gained-for increase.⁴⁰ Franchising authorities should be authorized by the revised Cable Act to impose such advance notice requirements.

Imprecise drafting has also permitted the FCC and various courts to limit the ability of individuals to receive cable, even when they are willing to pay the offered rate. Thus, despite relatively clear congressional intent, provisions that require cable operators to wire all parts of a community and that require landlords to permit cable operators to offer service to tenants have been unduly restricted.

The House Report states that the Cable Act, "[r]equires that cable service be made available in all areas of a city. . . ."⁴¹ The United States Court of Appeals for the D.C. Circuit, though, declared that the Act, "manifestly does not require universal service."⁴² The section of the 1984 Act in question states that "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the local area in which such group resides."⁴³

To determine the meaning of this language, the court quoted from the House Report, which stated that "a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this kind of practice [redlin-

³⁹ Cable Act, § 623(a), 47 U.S.C. § 543(a).

⁴⁰ One court has upheld a 90-day notice requirement. *Comcast Cablevision of Sterling Heights, Inc. v. City of Sterling Heights*, 178 Mich. App. 117, 443 N.W.2d 440 (1989).

⁴¹ HOUSE REPORT 934, *supra* note 12, at 20.

⁴² *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

⁴³ Cable Act, § 621(a)(3), 47 U.S.C. § 541(a)(3).

ing]."⁴⁴ The court stated, "[W]e read the sentence to require exactly what it says: 'wiring of all areas of the franchise' to *prevent redlining*."⁴⁵ Therefore, the court concluded that if there was no proof of redlining, wiring of a community could be limited. In quoting the House Report, the court omitted the key introductory phrase indicating that the franchising authorities were required to act "in awarding a franchise or franchises,"⁴⁶ in other words in the franchising process itself. Thus, franchising authorities were required to "assure . . . access"⁴⁷ before there could be any evidence of redlining. The obvious course of action was to require universal service in the franchise process.

Moreover, the concept of universal service permeates the regulation of electronic communication. In its allocation of television frequencies, the FCC has long had as its top priority the provision of television service to every part of the country.⁴⁸ Similarly, the FCC is statutorily required to protect, "the principle of universal telephone service, accessible to all segments of the population regardless of income."⁴⁹

The Cable Act should be clarified so that the principle of universal service unmistakably applies to cable television as well. All areas of a community should be wired and operators should be barred from using facially neutral reasons to avoid low income neighborhoods. The only exception should be those areas that the franchising authority and operator agree are too remote for economic wiring.⁵⁰

Consumers are also denied the opportunity to subscribe to cable television if they are not home owners but merely tenants. Many landlords sign an exclusive contract with a Satellite Master Antennae System ("SMATV") and preclude the cable operator from contracting with willing potential subscribers.⁵¹ An earlier draft of the Cable Act explicitly addressed this situation by re-

⁴⁴ *ACLU v. FCC*, 823 F.2d at 1580.

⁴⁵ *Id.* (emphasis in original)(quoting HOUSE REPORT 934, *supra* note 12, at 59).

⁴⁶ *Id.* at 1579 (quoting HOUSE REPORT 934, *supra* note 12, at 59) (omitted *id.* at 1580).

⁴⁷ *Id.* at 1560.

⁴⁸ 47 U.S.C. § 151 (1982) (making broadcasting available "to all the people of the United States").

⁴⁹ *United States v. Western Elec. Co.*, 569 F. Supp. 1057, 1120 (D.D.C. 1983), *aff'd*, 464 U.S. 1013 (1983).

⁵⁰ This was a statement made in a colloquy on the 1984 Act by prime House Sponsor, former Representative Wirth. 130 CONG. REC. H10,441-42 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth). Such debates are the "least reliable" means for determining the proper interpretation of a statute. *THE INTERPRETATION AND APPLICATION OF STATUTES*, *supra* note 7, at 156. Any such exception should be specified in the statutory language itself.

⁵¹ See, e.g., HOUSE REPORT 934, *supra* note 12, at 82.

quiring all owners of multi-unit residential buildings and mobile home parks to permit cable operators to provide service to those who desired it.⁵² This provision was removed during the Senate-House Conference on the bill,⁵³ but most of its provisions were incorporated in a different section of the Cable Act and can be read to imply that the right of tenants to receive cable is still in force.

Section 621(a)(2) permits any franchised cable operator to use both public rights-of-way and "easements . . . which have been dedicated for compatible uses."⁵⁴ The term easements includes private, as well as public, easements.⁵⁵ This section, as did the earlier provision, provides that an operator may not adversely affect the safety and appearance of the property and must pay for any damages. The new section, however, omitted any reference to landlords and mobile home park owners as well as any discussion of calculating "just compensation" for the taking.⁵⁶ To further confuse the courts, the discussion in the House Report on the importance of tenant's access to cable and the Cable Act's intent to provide such access were retained, even after the old statutory section was removed.⁵⁷

Courts have been uncertain how to interpret the Cable Act's mixed signals. The United States Court of Appeals for the Third Circuit has concluded that the removal of this provision, in section 633, indicates that Congress did not intend for cable operators to have any federal right of access to private, multi-unit dwellings.⁵⁸ Many other courts have disagreed and interpreted the 1984 Act to grant operators access to premises of tenants and condominium owners who want service.⁵⁹

⁵² H.R. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* HOUSE REPORT 934, *supra* note 12, at 114. Under this provision, landlords would have been permitted to deny access to cable operators only if they made available "a diversity of information sources and services equivalent to those offered by the [local] cable system." *Id.*

⁵³ 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

⁵⁴ Cable Act, § 621(a)(2), 47 U.S.C. § 541(a)(2).

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (court discusses just compensation and taking).

⁵⁷ HOUSE REPORT 934, *supra* note 12, at 36-37 and 79-83.

⁵⁸ Cable Inv., Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989). *See* Cable Assocs. v. Town and Country Management Corp., 709 F. Supp. 582 (E.D. Pa. 1989). One court has argued that the reasoning of *Woolley* does not restrict cable operator access to easements in private residential communities, but should be read to mean only that the Cable Act does not authorize operator access to the "interior of a multi-unit dwelling." Cable TV Fund 14-A, Ltd., v. Property Owners Ass'n, 706 F. Supp. 422, 429 (D. Md. 1989) (emphasis in original).

⁵⁹ *See, e.g.,* Centel Cable Television Co. v. Admiral's Cove Assocs., 835 F.2d 1359 (11th Cir. 1988); Greater Worcester Cablevision, Inc. v. Caravetta Enters. Inc., 682 F.

A redraft of the Cable Act should face this issue directly. No landlord should be able to come between a willing cable operator and a willing potential subscriber. As Congress stated in 1984, "There is simply no point in requiring diverse information sources and services if a large segment of the population — apartment dwellers — can be denied access to that information by a landlord who, in effect, functions as an editor for his or her tenants."⁶⁰ As long as the property owner is given the just compensation required by the Constitution,⁶¹ the tenant should receive the diversity of information services and sources promised by the Cable Act.

A final issue that has bedeviled courts involves standing to sue to enforce the Cable Act. Only a few of the Cable Act's substantive provisions, such as those for modification, renewal, privacy and unauthorized reception of programming, specify who may enforce rights created by the Act.⁶² Many other key provisions, though, are silent.⁶³

Courts have been forced to use the difficult test enunciated by the Supreme Court in *Cort v. Ash*⁶⁴ to determine if there is a private right of action to enforce these provisions.⁶⁵ Courts have split in determining whether cable operators may sue to enforce their section 621 right to utilize easements that are "dedicated for compatible uses." The United States Court of Appeals for the Eleventh Circuit held that cable operators could sue to obtain access to the easements,⁶⁶ but the United States Court of Appeals for the Sixth Circuit denied standing.⁶⁷ One court held that public access programmers had standing to enforce the section 611 ban on editorial control of access programming by a cable opera-

Supp. 1244 (D. Mass. 1985); *Rollins Cablevue, Inc. v. Saienni Enters.*, 633 F. Supp. 1315 (D. Del. 1986).

⁶⁰ HOUSE REPORT 934, *supra* note 12, at 36.

⁶¹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁶² Cable Act, §§ 625, 626, 631, 633, and 636; 47 U.S.C. §§ 545, 546, 551, 553, and 556.

⁶³ See *infra* notes 66-69 and accompanying text.

⁶⁴ 422 U.S. 66 (1975).

⁶⁵ The factors to be considered are: 1) Is the plaintiff a party whom Congress intended to benefit especially; 2) Does the legislative enforcement scheme imply congressional intent either for or against a private right of action; 3) Is private enforcement consistent with the statute's purpose; and 4) Does the Cable Act create an issue of federal law? *Id.* at 77-78.

⁶⁶ *Centel Cable Television Co. v. Admiral's Cove Assocs.*, 835 F.2d 1359 (11th Cir. 1988). Similar holdings were issued in *Cable Assocs. v. Town and Country Management Corp.*, 709 F. Supp. 582 (E.D. Pa. 1989) and *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n*, 706 F. Supp. 422 (D. Md. 1989).

⁶⁷ *Continental Cablevision of Mich., Inc. v. Edward Rose Realty, Inc.*, 840 F.2d 16 (6th Cir. 1988). See *Cable Invs., Inc. v. Woolley*, 680 F. Supp. 174 (M.D. Pa. 1987), *aff'd on other grounds*, 867 F.2d 151 (3d Cir. 1989).

tor,⁶⁸ while a different court has ruled that viewers lack standing to sue to enforce the leased access provisions of the Cable Act.⁶⁹

The Cable Act should be redrafted to make clear that all who are directly injured by a violation may sue to enforce the statutory protections. An over-extended city government may be incapable, reluctant or uninterested in bringing litigation. Private enforcement is needed to permit the parties most affected by a violation to protect not only their own rights but the public right to receive cable service and diverse access programming.

II. THE MORE THINGS CHANGE: THE IGNORED CONGRESSIONAL ATTEMPT TO CONTROL THE FCC

One of the primary motivating factors for the passage of the Cable Act was congressional concern over the path chosen by the FCC. Under the 1934 Communications Act, the Commission's authority to regulate cable had emanated from its power to regulate broadcasting.⁷⁰ Up until 1984, the Supreme Court had held that the FCC's power over cable was limited to that which was "reasonably ancillary" to the regulation of broadcasting.⁷¹ The Court was concerned that, because cable was not mentioned in the 1934 Act, a reading of the FCC's power without reference to broadcasting would give the FCC "unbounded" jurisdiction.⁷² On June 18, 1984, the Supreme Court upheld an FCC cable television regulation without reference to the Commission's power to regulate broadcasting.⁷³ The Court held that the FCC had "broad responsibilities," and thereby broad discretion, in the regulation of cable.

Concurrently, the FCC had embarked on an aggressive campaign to preempt much of the cable regulation at the local level. The Commission preempted the regulation of the rates charged for virtually all cable programming and permitted a cable company which had contracted with a city to provide programming

⁶⁸ *Missouri Knights of the Ku Klux Klan v. Kansas City, Missouri*, 723 F. Supp. 1347 (W.D. Mo. 1989).

⁶⁹ *New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 813-15 (S.D.N.Y. 1986) (discussing sections 612(d), 532(d)). The court interpreted the phrase "*any person aggrieved* by the failure or refusal of a cable operator to make channel capacity available," to be limited to programmers, not the potential viewing public deprived of such programming. *Id.*

⁷⁰ See 47 U.S.C. § 152(a) (granting the FCC power to regulate "all interstate and foreign communication by wire or radio").

⁷¹ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁷² *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

⁷³ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984) (upholding preemption of all state regulation of the "signals carried by cable system operators").

on the basic tier to retier such programming unilaterally.⁷⁴ Another decision restricted the ability of cities to enforce commitment for the funding of public access facilities.⁷⁵

Many in Congress were alarmed at the unrestrained power of the FCC. In the words of one legislator, "We must not abdicate our responsibility and turn cable regulation over to the FCC and the Supreme Court."⁷⁶ Significantly, even among those who favored deregulation for cable television, the FCC was apparently not held in high regard.⁷⁷ There is not a single word of praise for the FCC in either the House Report or the floor debate on the Cable Act.

Accordingly, the Cable Act explicitly limited the role and discretion of the FCC in matters of cable policy. Most notably, section 3 of the Cable Act constricts the source of FCC authority: "The provisions of this Act [the Communications Act of 1934] shall apply with respect to cable service . . . as provided in title VI [entitled 'Cable Communications']."⁷⁸ Thus, the FCC was denied the ability to use its open-ended "public interest" grant of authority over broadcasting,⁷⁹ but was limited to those duties specified in the Cable Act.

However, the FCC, continues to assert its former regulatory power. In preempting local regulation of the technical standards to be met by a cable operator, the FCC relied not only on the specific Cable Act provision on technical standards but on its pre-Act broad, amorphous power, "to regulate all aspects of interstate communication by wire or radio," and take "all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.'"⁸⁰

Though the Supreme Court upheld the FCC's preemption of technical standard regulation, the Court expressly declined to decide whether the FCC continues to possess its pre-Act regulatory power.⁸¹ In so declining, the Court included a long footnote

⁷⁴ See *Community Cable TV, Inc.*, 56 Rad. Reg. 2d (P&F) 735 (1984), *aff'd*, 54 Rad. Reg. 2d (P&F) 1351 (1983). For a further discussion of related issues, see generally *Cox Cable of New Orleans, Inc. v. City of New Orleans*, 594 F. Supp. 1452 (E.D. La. 1984), *vacated without opinion*, (E.D. La. Dec. 16, 1985).

⁷⁵ *City of Miami*, 56 Rad. Reg. 2d (P&F) 458 (1984).

⁷⁶ 130 CONG. REC. H10,444 (daily ed. Oct. 1, 1984) (statement of Rep. Markey).

⁷⁷ Even where the House Report endorsed federal preemption over certain areas, disapproval of the FCC was apparent: "[Franchising authority] must be based on certain important uniform Federal standards that are not continually altered by *Federal*, state or local regulation." HOUSE REPORT 934, *supra* note 12, at 24 (emphasis added).

⁷⁸ 47 U.S.C. § 3 (1982 & Supp. V 1987).

⁷⁹ 47 U.S.C. § 152(a) (1982 & Supp. V 1987).

⁸⁰ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

⁸¹ *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988).

presenting both sides' arguments as to the reach of the FCC's power. First, the Court discussed the new language of section 3 that specifies that the FCC's power over cable is provided in the Cable Act.⁸² Then the Court presented the following reason why, arguably, the FCC's power was undiminished: "On the other hand, the House Report suggests that this language is merely a more explicit grant of "exclusive jurisdiction" to the Commission over specified aspects of cable service, *see* H.R.Rep. No. 98-934, at 95-96 (1984), which settles matters that had occasionally been in dispute."⁸³

The citation to the House Report is curious, since the actual language does not seem to support a finding of broad FCC power over cable television. The complete language from the House Report quote states that the FCC's "exclusive jurisdiction" over cable is only "as provided in Title VI."⁸⁴ It does not imply that there is any other source of "exclusive jurisdiction" over cable for the FCC. Moreover, on the cited page 96, the House Report states that, "the addition of a new Title VI of the Communications Act [the Cable Act], regarding cable services, does not limit any jurisdiction the FCC may otherwise have over *other* communications services provided over a cable system."⁸⁵ Certainly, if Congress went out of its way to declare that the Cable Act was not intended to limit FCC jurisdiction over "other communications services provided over a cable system," it strongly implies that the Cable Act does limit FCC jurisdiction over *cable services* provided over a cable system.

A revision of the Cable Act should avoid the litigation that will inevitably follow the Supreme Court's discussion, without resolution, of this issue. New language should clarify Congress' desire to rein in the FCC. The scope of the FCC's power would be clearly, if redundantly, indicated by adding the word "only," so that section 152(a) read, "The provision of this Act shall apply with respect to cable service . . . *only* as provided in title VI."

Also troubling is the manner in which the FCC continues to regulate as if the Congress had not altered its permissible regula-

⁸² *Id.*

⁸³ *Id.* The Court also stated that section 303 of the Communications Act "continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters." *Id.* This reference to the unamended section 303(r) is unpersuasive as the Cable Act's jurisdictional provision could be easily interpreted as a specific limitation on the broader power. *See, e.g.,* LEGISLATIVE DRAFTING, *supra* note 10, at 101 (discussing implied amendment by inconsistent legislative action).

⁸⁴ HOUSE REPORT 934, *supra* note 12, at 95.

⁸⁵ *Id.* at 96 (emphasis added).

tory (or more precisely, deregulatory) goals. The FCC demonstrated its stubborn refusal to accede to congressional dictates when it described the congressional purposes behind the Cable Act as to "significantly deregulate the provision of cable service."⁸⁶ This alleged single-minded congressional intent was discovered by the FCC through a combination of wishful thinking and of carefully editing out all statements contrary to the Commission's "deregulation mania."⁸⁷ The Commission stated that:

Foremost among these [congressional purposes] is the intent of the statute to establish "standards which encourage the growth and development of cable systems[,] . . . assure that cable communications provide . . . the widest possible diversity of information sources and services to the public[,] . . ." and "[p]romote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."⁸⁸

The complete statutory language, which the Commission only partially quoted, reveals not a mandate for deregulation but an unmistakable congressional intent to balance the interests of both the regulators and the regulated. The full language, with the words omitted by the FCC italicized, expressed an intent to provide franchising "standards which encourage the growth and development of cable systems *and which assure that cable systems are responsive to the needs and interests of the local community*";⁸⁹ and "assure that cable communications provide *and are encouraged to provide* the widest possible diversity of information sources and services to the public."⁹⁰

Perhaps it is clearer in hindsight, but the FCC should not have been trusted to abandon its previous deregulatory goals and follow the more complex mandate of the Cable Act. The result of what one observer has termed the "unforeseen actions" of the FCC,⁹¹ has been a deregulation of cable rates in more than 97% of the nation's cable systems,⁹² and the FCC's preemption of local requirements for technical standards that exceed the minimum imposed by the

⁸⁶ Implementation of the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637, 18,650 n.69 (1985).

⁸⁷ 130 CONG. REC. H10,444 (daily ed. Oct. 1, 1984) (statement of Rep. Markey).

⁸⁸ Implementing the Provisions of the Cable Communications Policy Act of 1984, 49 Fed. Reg. 48,765, 48,765-48,766 (1984).

⁸⁹ Cable Act, § 601(2), (4), 47 U.S.C. § 521(2), (4) (emphasis added).

⁹⁰ *Id.*

⁹¹ *Oversight of Cable TV*, *supra* note 6, at 187 (statement of Mayor Sharpe James of Newark, N.J.).

⁹² U.S. General Accounting Office, *National Survey of Cable Television Rates and Services* 4 (1989).

FCC during 1974.⁹³

In the future, the FCC should be denied discretion to determine the scope of appropriate preemption and deregulation. Congress, not the FCC, should define "effective competition" for rate regulation and should permit local governments to supplement the technical and quality standards that cable systems must meet.

III. TO DRAFT CABLE LEGISLATION, CONGRESS MUST LISTEN TO "THE WIDEST POSSIBLE DIVERSITY OF INFORMATION SOURCES"⁹⁴

The process by which the Cable Act was drafted guaranteed a future of unending difficulty. Behind closed doors, two players, the cities and the cable industry, hammered out a proposal that both believed would protect their interests. Their agreement became the basis for the Cable Act.⁹⁵ Delegating the initial drafting of the legislation to these two interested parties was probably essential in the political environment of the early 1980's if there was to be any chance for enacting comprehensive legislation. Unfortunately, the self-interests of these two groups did not include the interests of the rest of the universe affected by the legislation. More insidiously, there were certain issues for which the negotiators were not adversaries but shared an interest, an interest at odds with that of the subscribing public. Obviously, any revision of the Cable Act must take into account the views of all those affected by the legislation.⁹⁶

Although the representatives of city government and cable operators fought over the role that the cities should have in regulating cable, they shared a desire to preclude others from having a significant role. To the operators, this would permit fewer parties to regulate; for the cities, it meant fewer limitations of their discretion. Thus, the original draft of the Cable Act which was agreed to by the cities and cable industry denied the public any

⁹³ Report and Order in MM Docket No. 85-38, 50 Fed. Reg. 52,462 (1985), *maintaining standards established in* Report and Order in Docket No. 20,018, 49 F.C.C.2d 470, 477-80 (1974). The 1985 preemption was upheld in *City of New York v. FCC*, 486 U.S. 57 (1988).

⁹⁴ Cable Act, § 601(4), 47 U.S.C. § 521(4).

⁹⁵ See, e.g., 130 CONG. REC. S14,283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater) (describing negotiations between the cities and cable industry as basis for cable legislation).

⁹⁶ Congress seems to have learned this lesson. Among the speakers at congressional hearings on cable legislation, aside from the cities and the cable industry, are representatives from broadcasters, wireless cable operators, the telephone industry, public access programmers and consumer groups. See *Oversight of Cable TV*, *supra* note 6, at III.

role in the renewal process.⁹⁷ The proceedings were to be only for the benefit of the local government and the incumbent operator. It took a last minute amendment to provide that the public be granted "appropriate notice" and "opportunity for comment" on either an informal granting of renewal or during a hearing on the cable company's performance under the franchise.⁹⁸

This limited grant of participation neither specifies the role to be played by the public nor provides the public with an adequate role in the renewal decision. The Cable Act should be amended to permit the public to stop "sweetheart deals" for renewal between franchising authorities and cable operators.⁹⁹ The public should be permitted to require a public hearing on the adequacy of the cable operator's performance under the existing franchise and request proposals for the renewed franchise. This right could be enforceable either through individual request or through the obtaining of signatures of a certain percentage of the population. Second, any city granting renewal should be required to announce, in writing, the reasons for its decision. Finally, subscribers should be permitted to appeal any granting of a renewal if either proper procedures are not followed or the city's published factual conclusions are "clearly erroneous" in light of the information obtained at the hearing.

A second area where the cities and cable industry lacked incentive to protect the public interest involves access to the cable system for non-affiliated programmers. The Cable Act contains provisions regarding both "public access," the cablecasting of programs at little or no cost to the general public, and "leased access,"¹⁰⁰ the leasing of channel time for commercial distribution of programming. Due to the failures of the Cable Act, public access has been unnecessarily hindered and leased access has been a total, undeniable failure.

Third-party access to the cable system was a critical part of the balance struck by the Cable Act. In fact, one of the stated purposes of the Cable Act was to "assure that cable communica-

⁹⁷ See H.R. 4103, 98th Cong., 2d Sess. § 626, reprinted in HOUSE REPORT 934, *supra* note 12, at 110.

⁹⁸ Cable Act, § 626 (a), (h), 47 U.S.C. § 546(a), (h). This amendment was added on the last day of congressional debate. 130 CONG. REC. S14,281 (daily ed. Oct. 11, 1984) (amendment of Sen. Goldwater).

⁹⁹ This is not necessarily a frivolous fear. Virtually all franchises are renewed, with only a few notable exceptions. In 1984, it was reported that operators in New York State had been awarded renewal in all 370 of their attempts. Narrod, *State Regulators See More Work with Passage of New Cable Law*, Multichannel News, Dec. 3, 1984, at 33, col. 1.

¹⁰⁰ The Cable Act refers to "leased access" as "commercial use." Cable Act, § 612, 47 U.S.C. § 532.

tions provide . . . the widest possible *diversity of information sources* and services to the public."¹⁰¹ The theory behind public access is that the cable operator, the single electronic gatekeeper in a community, should not monopolize the entire multi-channel capacity of a system constructed on the public rights-of-way. In lieu of monopolization, "[public access channels] provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas."¹⁰² Accordingly, the Act permits franchising authorities to require that channels be set aside for public access and that cable operators provide funding, staffing, and hardware for the production of access programming, and prohibits the cable operator from exerting any editorial control over the access programming.¹⁰³ The operator is permitted to present its own programming on unused access channels.¹⁰⁴

Under the current legislative scheme, access use has grown. More than 1,200 cable systems run access programming and approximately 10,000 hours of access programming are produced each week.¹⁰⁵ The development of access has been hampered, though, by the failure of the Cable Act to protect it from assault, hostility and neglect by certain members of both the cable industry and city government.

Almost 8,000 cable systems do not provide access for members of their community. In some communities this is due to the limited capacity of outdated 12-channel systems,¹⁰⁶ but elsewhere the absence is due to lack of local governmental initiative. Because the concept of access programming is still relatively new, there is not a constituency demanding access in every town. The revised Cable Act should permit all Americans to communicate electronically with their neighbors. Every cable system that uses public rights-of-way should be required to provide access for members of the local community. If that access is not used, the "fallow time" provisions will permit the operator to present programming. But that choice should only be made after the

¹⁰¹ *Id.* at § 601(4), 47 U.S.C. § 521(4) (emphasis added).

¹⁰² HOUSE REPORT 934, *supra* note 12, at 30.

¹⁰³ Cable Act, § 611(a), (b), and (e), 47 U.S.C. § 531(a), (b), and (e).

¹⁰⁴ *Id.* at § 611(d), § 531(d). This is known as the "fallow time" provision.

¹⁰⁵ Kierman, *To Watch is O.K., But to Air is Divine*, U.S. NEWS & WORLD REPORT, Oct. 16, 1989, at 112.

¹⁰⁶ Since more than half of the nation's approximately 9,000 cable systems have at least 30 channels, this excuse is no longer the primary source of the problem. *Oversight of Cable TV*, *supra* note 6, at 339 (statement of FCC Chairman Alfred C. Sikes).

community has had the opportunity to learn of and experience "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."¹⁰⁷

To flourish, access must be adequately funded and available for all to view. Most of the "funding" for access comes from the sweat equity of the volunteer, but a minimum of equipment and services for community use is needed to permit individuals and small groups to learn how to produce access programming. In times of budget crunches, money raised from the franchise fee will be used for police forces and potholes, not access.¹⁰⁸ In many communities, access will be crippled if local government is forced to make such a choice.

Cities should not be put in the situation of making this painful choice. Unlike franchise fees that represent "rent" for use of city streets,¹⁰⁹ money for access represents a legitimate, directly relevant, regulatory purpose — ensuring that the cable system that occupies the public property is available for communication by the public.¹¹⁰ Accordingly, the revised Cable Act should provide that money for access not be deducted from the franchise fee ceiling.

Access uniquely permits electronic communication by "poor and wealthy alike," and reduces concern of "domination of the media by the wealthy."¹¹¹ Yet access programming cannot reach those who cannot afford the unregulated rates of the cable operator. There can be no "effective competition" for public access when no other forum for electronic communication is available. Therefore, communities should be permitted to regulate the rates charged for the least expensive tier containing access channels. This lifeline rate will permit a community to create an electronic village instead of an information underclass.

Finally, an important silence in the Cable Act should be addressed. Many public access centers are run neither by City Hall

¹⁰⁷ HOUSE REPORT 934, *supra* note 12, at 30. The House Report noted that access can, "also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." *Id.*

¹⁰⁸ The Cable Act limits franchise fees to 5% of gross revenue per 12 month period. Cable Act, § 622(b), 47 U.S.C. § 542(b).

¹⁰⁹ See, e.g., *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988).

¹¹⁰ This is analogous to the requirement that newspapers pay a license fee for the right to place newsracks in a public train station. The court, in upholding this fee, stressed that it was not a tax for filling the general coffers, but was to be used to provide economical commuter transportation, in other words a directly related regulatory purpose. *Gannet Satellite Information Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984).

¹¹¹ HOUSE REPORT 934, *supra* note 12, at 36.

nor the cable operator, but by independent non-profit organizations.¹¹² Access corporations, though not mentioned in the Cable Act, are increasingly being used to run access channels.¹¹³ They facilitate the creation of broad community programming without undue political and economic pressure. The Cable Act provides that cable operators who do not edit or produce access programming will not be liable for its content.¹¹⁴ This makes good sense; only the programmer who produces the program should be responsible for its legal consequences.¹¹⁵ The statutory language should be clarified so that the protection from liability extends to any entity be it city, independent access organization or some alternate form of management that operates the access channel, yet is forbidden to exercise editorial control.¹¹⁶

Leased access has not been as fortunate as public access. The inadequacies of the Cable Act have not simply hindered, but have smothered, the ability of non-affiliated programmers to reach the public through a system of leased access.¹¹⁷ Although the Cable Act requires that cable operators with more than thirty-six channels provide leased access at prices, terms and conditions that are "reasonable,"¹¹⁸ a reviewing court may not consider the arrangement between a cable operator and its affiliate programmers in determining what is "reasonable."¹¹⁹ Thus, cable opera-

¹¹² See, e.g., Taylor & Brand, *Access: The Community Connection*, reprinted in CABLE TV RENEWALS & REFRANCHISING 82 (J. Rice, ed. 1983) (describing an Access Management Corporation as one, "set up by city ordinance to handle access. It is granted a portion of the franchise fee, and its operation and relationship with both the city and the cable operator is established by city ordinance."). Numerous cities including Boston, Massachusetts, Cincinnati, Ohio, and Austin, Texas have such independent entities running access.

¹¹³ See, e.g., FOUNDATION FOR COMMUNITY SERVICE CABLE TELEVISION, COMMUNITY CHANNELS, FREE SPEECH & THE LAW 11 (1988).

¹¹⁴ Cable Act, § 638, 47 U.S.C. § 558.

¹¹⁵ See, e.g., Cable Act, § 637, 47 U.S.C. § 557 (two years imprisonment and \$10,000 fine for anyone cablecasting obscene programming).

¹¹⁶ While a legal argument can be made that such protection is available through either the Cable Act or the Constitution, the cloud of uncertainty that pervades this area should be removed. See Meyerson, *The Right to Speak, The Right to Hear, and the Right Not to Hear: The Technological Resolution to the Cable/ Pornography Debate*, 21 U. MICH. J. L. REF. 137 (1988). See also *Oversight of Cable TV*, supra note 6, at 323 (statement of Sharon Ingraham, National Federation of Cable Programmers) (resident of Cincinnati, Ohio sues both city and access center over the content of access programming, though neither entity was permitted to exert editorial control).

¹¹⁷ One of the very few instances of use of leased access was in Puerto Rico, where a cable company agreed to carry a former programmer, the Playboy Channel, as a "commercial use" channel, to avoid prosecution for "obscenity." *Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 698 F. Supp. 401 (D.P.R. 1988).

¹¹⁸ Cable Act, § 612(c), (d), 47 U.S.C. § 532(c), (d). See generally *Oversight of Cable TV*, supra note 6, at 395-97 (statement of Preston R. Padden).

¹¹⁹ Cable Act, § 611(d), 47 U.S.C. § 531(d).

tors have been permitted to favor their own programmers at the expense of the unaffiliated programmers.

The theory behind leased access voiced in 1984 is still valid:

Third-party commercial access complements [public] access by assuring that sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings, or which are otherwise not offered by the cable operator (for political reasons, for instance). . . .

. . . .
 . . . A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. *Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment.*¹²⁰

To make this "fundamental" requirement meaningful, several changes must be implemented in the commercial use section. First, unaffiliated programmers must be entitled to access to a cable system at rates, terms and conditions that are *at least* as favorable as those provided to affiliated programming services. Second, there must be a quick and inexpensive means for a programmer to learn what rates will be charged. Thus, either franchising authorities or state Public Service Commissions should be permitted to establish rates, terms, and conditions for commercial access. Finally, the FCC has stated that a cable system that has not been "deliberately configured" to technically preclude commercial access is not required to share its hardware and facilities, even if they are necessary for the operation of commercial access.¹²¹ The Cable Act should be revised so that cable operators have an affirmative duty to share all facilities and services that are necessary for the growth and viability of leased access.

Because the Cable Act was primarily negotiated by cities and cable operators, another issue that received virtually no attention was channel positioning. The Cable Act permitted cable operators to determine the channel position for the programming it offered.¹²² The theory was that, as at least a partial first amendment

¹²⁰ HOUSE REPORT 934, *supra* note 12, at 30-31 (emphasis added).

¹²¹ Implementation of the Provisions of the Cable Communications Policy Act of 1984, 18,637, 18,642 (1985). The FCC made this statement despite being currently barred from rulemaking in the area of commercial access. Cable Act, § 612(g), 47 U.S.C. § 532(g).

¹²² Cable Act, § 624(g), 47 U.S.C. § 544(g).

speaker that selected programming services, cable operators should be free to determine where these services would be displayed.

The deficiency in this reasoning is that the unrestrained power to determine channel position has trampled first amendment rights of other speakers, namely local broadcasters and public access programmers. Broadcast stations and access channels have been moved away from the channel locations where they were known to viewers and to high-number positions with inferior reception.¹²³ Significantly, giving the power to reposition access channels to a cable operator does not further first amendment principles because cable operators are not "speakers" for access channels but merely serve as "conduits."¹²⁴ In other words, access channels are not within operators' editorial interest and operators should not be permitted to obstruct the development of an audience for access programming.

With the demise of the must-carry rules,¹²⁵ cable operators have had the freedom to select which broadcasters to carry. Even without new must-carry rules, though, random repositioning by cable operators harms the public interest. There is, without question, a public benefit from free, over-the-air television. Television stations generally invest great sums of money to acquaint the public with their channel numbers. Historically, some cable systems have positioned broadcasters on channels different from their FCC-assigned number and the stations have been forced to advertise both numbers. In either case, it will obviously injure broadcasters to pay the enormous added expense of reeducating the public to a new channel position. If there is more than one cable system carrying a local broadcast station, each can put the station at a different channel position, further harming the ability of that broadcaster to communicate with its audience. Random repositioning poses an obvious threat to the well-being of local broadcasters, especially smaller UHF stations. If local broadcast channels are, even to a small extent competitors with cable television,¹²⁶ it makes no sense to put the power to hinder the effectiveness of the broadcasters in the hands of their competitor.¹²⁷

¹²³ See, e.g., *Oversight of Cable TV*, *supra* note 6, at 381-96 (statement of Preston R. Padden).

¹²⁴ HOUSE REPORT 934, *supra* note 12, at 35.

¹²⁵ See *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

¹²⁶ Or, in the view of the FCC, "effective competition" for cable operators. *Implementation of the Provisions*, 50 Fed. Reg. at 18,648-18,651.

¹²⁷ See, e.g., Ziegler, *United Cable Eyes Plan to Bump Network Affils to Upper Channels; TCI Unit Will Cluster Independents*, *Multichannel News*, Nov. 3, 1986, at 1, cols. 1-3.

The Cable Act should be revised to deny cable operators such power. The position of access channels should be set by the franchising authority. The channel position of local broadcasters should be, where possible, that set by the numbering selected by the FCC, except that when a broadcaster has had a different position on a cable system for a significant period of time, the broadcaster should have the choice of staying at that number or moving to the one assigned by the FCC.

IV. CONCLUSION

When Congress drafted the Cable Act in 1984, it was not writing on a blank slate, but over a confusing hodgepodge of contradictory policies and conflicting jurisdictions. In revising the Cable Act, Congress will have an easier task, since the framework is already in place and because experience under the Cable Act has so blatantly revealed its weaknesses.

Care must nonetheless be taken to avoid repeating the errors of the past. All voices must be heard in the debate on revision. The public interest cannot be served if only the most powerful interests are considered. Second, the sources of power must be more carefully delineated. A Federal Communications Commission bent on deregulation can prevent localities from performing the tasks assigned them by Congress. The preemption powers of the FCC over cable must be precisely detailed.

Finally, the confusing world of cable legislation does not need the further confusion of imprecise language. Not only must policy considerations be carefully considered, but the language chosen to express policy determinations must be painstakingly evaluated. Key words and phrases must be defined so that their meaning will be understood. In creating a new legal universe to ensure efficient cable communications, Congress must ensure that the new legal rules are efficiently communicated as well. In drafting a revised Cable Act, "[t]he draftsman's job is to avoid legal uncertainty, not to create it."¹²⁸

¹²⁸ LEGISLATIVE DRAFTING, *supra* note 10, at 29.